

November 2017

Crime and Punishment: A Catholic Perspective

Joseph L. Falvey, Jr.

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Joseph L. Falvey, Jr. (2004) "Crime and Punishment: A Catholic Perspective," *The Catholic Lawyer*. Vol. 43 : No. 1 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol43/iss1/7>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CRIME AND PUNISHMENT: A CATHOLIC PERSPECTIVE

JOSEPH L. FALVEY JR.*

INTRODUCTION

In November 2000, the United States Conference of Catholic Bishops (USCCB) issued *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*.¹ This statement offers, “a perspective inspired by our Catholic tradition to the national discussion on crime.”² Accordingly, *Responsibility, Rehabilitation, and Restoration* drew from Sacred Scripture and the Catholic Church’s moral and social teaching to discuss the nature and purposes of criminal punishment, and to demonstrate how misguided ideas on punishment contribute to the problems of our criminal justice system.³

Although *Responsibility, Rehabilitation, and Restoration* emphasizes the importance of restitution for victims and promotion of the common good,⁴ the USCCB contends that, from the Catholic perspective, “protecting society and rehabilitating those who violate the law” are the primary purposes of punishment.⁵ This contention, however, does not fully represent the Catholic perspective on the nature of criminal punishment. It omits virtually all reference to the Church’s longstanding

* Associate Dean for Academic Affairs and Associate Professor of Law at Ave Maria School of Law, Ann Arbor, Michigan. B.A.; University of Notre Dame; J.D., Notre Dame Law School; LL.M. The Judge Advocate General’s School of the Army. I am indebted to Patrick Laurence and Vilius Lapas for their research assistance on this article.

¹ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice* (2000) [hereinafter *Responsibility, Rehabilitation, and Restoration*], <http://www.usccb.org/sdwp/criminal.htm>.

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *Id.*

teaching that punishment is justified by, and is primarily a function of, retribution.

This article will summarize *Responsibility, Rehabilitation, and Restoration* and detail the nature and purposes of punishment as manifested by the Catholic tradition. This article will also discuss what punishment is, why we punish, and finally, what justifies punishment in light of the writings of St. Thomas Aquinas. In so doing, it will show that the USCCB failed to recognize the Catholic Church's appreciation of retribution as a basis for punishment. Such failure limits the potential impact of the USCCB statement and risks causing the USCCB to advance unsound policies related to crime and punishment.

Moreover, Catholics encouraged to take action by the USCCB statement risk misshaping alternatives to our criminal justice system. Had the USCCB reiterated the Catholic Church's long-standing recognition of retribution as the primary basis for punishment, these risks would have been reduced rather than increased.

I. THE USCCB STATEMENT

Responsibility, Rehabilitation, and Restoration was motivated by the general belief that the United States criminal justice system is not functioning effectively, and by the particular belief that the system does not conform to Catholic principles.⁶ Among the many problems identified are that crime victims are ignored, offenders are not rehabilitated, the system disparately impacts offenders' children, and the community loses a sense of security.⁷ To the USCCB, these problems are partly attributable to a misunderstanding regarding the nature of punishment: "Our society seems to prefer punishment to rehabilitation and retribution to restoration thereby indicating a failure to recognize prisoners as human beings."⁸ Such a view of punishment is manifested in mandatory sentencing, overly strict sentences for drug offenders, high rates of incarceration, and the increased use of the death penalty.⁹

⁶ *See id.*

⁷ *See id.*

⁸ *Id.*

⁹ *See id.*

The condemnation of punishment as retribution is only intelligible if one equates retribution with "punishment for its own sake" or "revenge and retaliation."¹⁰ "[P]unishment for its own sake is not a Christian response to crime. Punishment must have a purpose. It must be coupled with treatment and, when possible, restitution."¹¹ The USCCB further contends that punishment may not be imposed for the sake of vengeance, revenge, or retaliation: "Jesus . . . rejected revenge and retaliation and was ever hopeful that offenders would transform their lives and turn to be embraced by God's love."¹² Punishment, then, "must have a constructive and redemptive purpose."¹³ This purpose is identified as "protecting society and rehabilitating those who violate the law."¹⁴

Although the USCCB notes that the relationship of punishment to the common good is important,¹⁵ they provide no in-depth discussion as to why this is the case. Rather, the document simply paraphrases the *Catechism of the Catholic Church*.¹⁶ The USCCB also instructs that repair of the harm done to victims and society requires "restoring the balance of rights through restitution."¹⁷

Thus, according to the USCCB, the morally justifying aims of criminal punishment are rehabilitation, social protection, and restitution. Retribution or "punishment for its own sake," is not viewed as a Christian response to crime and can never justify punishing criminal offenders.¹⁸

One must examine the Catholic intellectual tradition, especially the writings of St. Thomas Aquinas, to assess whether this understanding of the criminal justice system and the purposes of punishment are consistent with Catholic teaching. It is appropriate to look to the writings of Aquinas for the Catholic

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *id.* (stating that "community has a right to establish and enforce laws to protect people and to advance the common good.").

¹⁶ See *id.* (citing CATECHISM OF THE CATHOLIC CHURCH ¶ 2266 (2d ed. 1997)) ("[P]unishment . . . should serve three principal purposes: (1) the preservation and protection of the common good of society, (2) the restoration of public order, and (3) the restoration or conversion of the offender.").

¹⁷ *Id.*

¹⁸ *Id.*

position on punishment because, to a large extent, his mind is the mind of the Catholic Church.¹⁹

II. THE NATURE OF PUNISHMENT

Fundamental to an understanding of the nature of punishment is an understanding of free will. According to the Church's constant teaching, only human beings possess free will.²⁰ Other creatures are naturally ordered and are incapable of acting in any way other than that dictated by instinct or natural inclination,²¹ but human beings, by their rational nature, are capable of apprehending "good" and are therefore able to move themselves towards that good, not by necessity, but by their rational appetite—that is, the will.²² Consequently, when a human being deliberately moves himself towards "evil," he is blameworthy and deserving of punishment.²³

¹⁹ Blessed Pope Urban V, addressing the University of Toulouse in 1368, proclaimed that "It is our will, which We hereby enjoin upon you, that you follow the teaching of Blessed Thomas as the true and Catholic doctrine and that you labor with all your force to profit by the same." *Constitutio* 5a, data die 3 Aug. 1368, ad Cancell. Univ. Tolos. More recently, Pope Leo XIII, in his encyclical *Aeterni Patris*, called Aquinas "the special bulwark and glory of the Catholic faith" and exhorted the faithful to restore the "golden wisdom of St. Thomas, and to spread it far and wide for the defense and beauty of the Catholic faith." LEO XIII, ENCYCLICAL LETTER *AETERNI PATRIS* [ON THE RESTORATION OF CHRISTIAN PHILOSOPHY] ¶ 17, 31 (1879), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris_en.html. Pope John Paul II noted in his encyclical *Fides et Ratio* that the "Church has been justified in consistently proposing Saint Thomas as a master of thought and a model of the right way to do theology." JOHN PAUL II, ENCYCLICAL LETTER *FIDES ET RATIO*, ¶ 43 (1998), available at <http://www.vatican.va/edocs/ENG0216/PA.HTM>. Of course, the teaching of a theologian, even the greatest theologian of the Church, does not carry magisterial weight.

²⁰ Compare, CATECHISM OF THE CATHOLIC CHURCH ¶ 1730 (2d ed. 1997), with *id.* JOHN PAUL II, ENCYCLICAL LETTER *FIDES ET RATIO*, ¶¶ 2415–2418.

²¹ See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 17, art. 2, at 657 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

²² See *id.* at Q. 77, art. 1, at 934 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

²³ Thus, we punish individuals possessing the requisite *mens rea*, or "evil mind," but excuse conduct where the will is overborne, as with the duress defense. In such cases, the defendant is said to have an excuse. See, e.g., *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

According to Aquinas, those responsible for a particular order may inflict punishment for the voluntary disturbance of that order.²⁴ When a person willingly violates the law, he or she violates the civil order and the common good. Thus, civil authorities, being responsible for the civil order and the common good, may appropriately administer punishment.²⁵

For Aquinas, "punishment" possesses two attributes. First, the act of punishment must be perceived by a potential wrongdoer as an "evil"—something to be avoided.²⁶ If punishment involves the deprivation of some due good,²⁷ and the human will is inclined to pursue that which it perceives as good,²⁸ then the human will seeks to avoid such a deprivation. Thus, to constitute punishment, an action must consist of something perceived as an "evil," so that potential wrongdoers will refrain from breaking the law to avoid the attached punishment. As Aquinas said in the *Summa Contra Gentiles*, "[S]ince a reward is what is set before the will as an end whereby one is stimulated to good action, punishment, on the contrary, in the guise of some evil that is to be avoided, is set before the will to restrain it from evil."²⁹

Second, to constitute punishment, the act must be opposed to the will.³⁰ If the essence of punishment includes the deprivation of some good, punishment must be opposed to the will because no one wills to be deprived of some good. The offense for which punishment is imposed reflects this truth. In committing a crime, a criminal follows his own will beyond what is allowable under the law.³¹ For justice to be restored, it is necessary that the criminal be deprived, because of this

²⁴ See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 87, art. 1, at 973 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

²⁵ See *id.* at Q. 90, art. 3c, at 995 ("[T]he directing of anything to the end concerns him to whom the end belongs.").

²⁶ See 3 ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, pt. II, ch. 141, at 207 (Vernon J. Bourke trans., University of Notre Dame Press 1975) (1956).

²⁷ See *id.*

²⁸ See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 6, art. 1, at 616 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

²⁹ See 3 ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, pt. II, ch. 141, at 207 (Vernon J. Bourke trans., University of Notre Dame Press 1975) (1956).

³⁰ See *id.*

³¹ See, e.g., See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 87, art. 6, at 977 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

excessive indulgence of his will, by undergoing something contrary to his will. Again, Aquinas said:

"It is proper that, inasmuch as one has obeyed one's own will by transgressing the law of God, to that extent one should compensate in the contrary direction, so that thus the equality of justice may be protected."³²

It is also important to understand the distinction between crime and punishment as it relates to "evil." Aquinas divides all evil into two categories: crime and punishment.³³ When a human being deliberately moves himself toward evil, this is a fault or crime ("culpa"). In rational creatures, this is a crime because it involves the failure of perfect action over which a person is master by virtue of his or her free will.

However, when a human being suffers a deprivation that is contrary to his will, this is a penalty or punishment ("poena").³⁴ Punishment is an "evil" only because it involves a deprivation, and not because it is a failed or immoral action. Moreover, punishment is "evil" only in relation to the one who suffers it, as when a prisoner is deprived of the good of liberty, but not in relation to the one who punishes. Instead, punishment is a good in relation to the common good of the punished criminal's community. Although punishment is manifestly an evil in regard to the person who suffers it, punishment in itself is a good, but the end of punishment is also a good because the order of justice is restored. In other words, the act of punishing is not an evil action.³⁵

Although punishment must necessarily be an evil in relation to the criminal, and must also be opposed to his will, it is

³² S. THOMAE AQUINATIS, II SCRIPTUM SUPER LIBROS SENTENTiarUM, d. 42, q. 1, a. 2, at 5 (R.P. Mandonnet, O.P. ed., Sumptibus P. Lethielleux 1929) ("Oportet ut quantum voluntati suae obedit praeter legem Dei, tantum etiam in contrarium recompenset, ut sic iustitiae servetur aequalitas.").

³³ See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. I, Q. 48, art. 5, at 252 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947) (stating that "every evil in voluntary things is to be looked upon as a pain or a fault").

³⁴ When a man is born blind, for example, he lacks a certain "good" which he should have by nature. Aquinas gives blindness as an example of a penalty or punishment because, according to the Catholic Faith, all human suffering, if not due to one's personal fault, is due to Original sin. See *id.*

³⁵ See 3 ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, pt. II, ch. 146, at 220 (Vernon J. Bourke trans., University of Notre Dame Press 1975) (1956) ("[T]o punish the wicked is not in itself evil.").

important to note that punishment is not defined merely by the imposition of an evil against one's will. Kidnapping, for example, includes the deprivation of a good (liberty) against the victim's will. Yet, this is not punishment, and more is required for it to constitute criminal punishment. An act imposed against another's will is only understood as punishment based on the underlying purposes of the act. For example, the act of confining another against his will for the purpose of obtaining a ransom is distinguishable from the same behavior imposed for the purpose of redressing a crime. The first act is kidnapping, while the second is punishment. Thus, a full understanding of punishment cannot be reached without knowing its underlying purpose.

III. THE PURPOSES OF PUNISHMENT

Responsibility, Rehabilitation, and Restoration purports to give a Catholic perspective on criminal justice.³⁶ According to the USCCB, criminal punishment is justified principally by the need for social protection and the rehabilitation of the criminal.³⁷ These are merely secondary aims, however, and not justifications. According to Catholic tradition, retribution is the principal and justifying aim of punishment. As detailed below, this is clear from previous statements of the USCCB, the *Catechism*, and the teachings of Aquinas. There is a critical distinction, however, between the primary aim intrinsic to the nature of punishment—retribution for the violated moral order—and the primary aim of punishment that the civil authorities' intended—retribution for the violated public or civil order.

A. Retribution

The discrediting of retribution as the primary goal of punishment reflects a misunderstanding regarding the meaning of "retribution." To some, the notion of retributive justice is a thin veil for its true motives—revenge and hatred.³⁸ Retribution,

³⁶ See *Responsibility, Rehabilitation, and Restoration*, *supra* note 1.

³⁷ *Id.*

³⁸ See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 152 (R.J. White ed., Cambridge University Press 1967) ("[T]he feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.").

properly speaking, does not imply revenge, cruelty, or hatred. Regarding criminal punishment, retribution is a demand of justice whereby the criminal is compelled to render his proper due in satisfaction of the order violated by his actions.³⁹

The demands of justice will differ, however, according to the order that the punishment is attempting to restore. Aquinas teaches that a crime disturbs several different orders: the universal order, the public or civil order, and the order of a person's nature to his reason. In its primary sense, retribution restores the universal order that the crime disturbs—divine retribution; in a secondary sense, it restores the civil order—retribution by the state. For example, when a thief steals another's goods, justice—restoration of the moral order—demands that he return the goods to the owner. However, the civil order that the criminal violates, embodied in the violated law, must also be given proper attention. Retribution is an act of justice inasmuch as this "debt" is satisfied; the criminal returns to the civil order its proper due.

B. The Catholic Church's Teaching on the Purposes of Punishment

According to traditional Catholic teaching, properly understood, retribution is the primary and justifying aim of punishment, not rehabilitation, social protection, or any other worthy aim. In their 1980 statement on capital punishment,⁴⁰ the USCCB seemed to have a better understanding of this teaching than they do in *Responsibility, Rehabilitation and Restoration*.⁴¹ The USCCB correctly defined retribution as "the restoration of the order of justice which has been violated by the action of the criminal."⁴² Moreover, it stated, "the need for retribution does indeed justify punishment. For the practice of punishment both presupposes a previous transgression against the law and involves the involuntary deprivation of certain goods."⁴³

³⁹ BLACK'S LAW DICTIONARY 1317 (6th ed. 1990).

⁴⁰ USCCB Statement, United States Conference of Catholic Bishops (1980)[hereinafter USCCB Statement], at <http://www.usccb.org/sdwp/national/criminal/death/uscc80.htm>.

⁴¹ See *Responsibility, Rehabilitation, and Restoration*, *supra* note 1.

⁴² USCCB Statement, *supra* note 41.

⁴³ *Id.*

Similarly, the *Catechism of the Catholic Church* teaches that “[p]unishment has the primary aim of redressing the disorder introduced by the offense.”⁴⁴ In his encyclical *Evangelium Vitae*, Pope John Paul II echoes this teaching:

The primary purpose of the punishment which society inflicts is “to redress the disorder caused by the offence.” Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom.⁴⁵

Arguably, the *Catechism* and *Evangelium Vitae* could be interpreted as referring to the redress of the criminal’s disorder within his soul when speaking of redressing the disorder introduced by the offense. If so, *Responsibility, Rehabilitation, and Restoration* would accurately reflect the Church’s teaching, because rehabilitation of the criminal is offered as one of the justifications for punishment. Such an interpretation, however, is untenable. Although indicating that the primary aim of punishment is to redress the disorder, the *Catechism* further states that, “[w]hen it is willingly accepted by the guilty party, it assumes the value of expiation.”⁴⁶ Implicitly, it is possible to justly administer punishment even when the guilty party does not willingly accept it. Thus, the order rectifying the situation need not be within the criminal’s soul and the punishment need not necessarily aim towards the rehabilitation of the offender.

Some have argued that the *Catechism* and *Evangelium Vitae* heralded a development or even a change of doctrine in the Church’s teaching on punishment, especially with regard to capital punishment.⁴⁷ The *Catechism* gives three purposes for punishment—redressing the disorder caused by the crime, protecting society, and reforming the criminal.⁴⁸ Concerning

⁴⁴ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20, ¶ 2266.

⁴⁵ JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 56 (1995), available at http://www.vatican.va/edocs/ENG0141/_PP.HTM.

⁴⁶ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20, ¶ 2266.

⁴⁷ See Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 36–47 (2000) (summarizing the emerging views about the death penalty within the Catholic Church after the promulgation of *Evangelium Vitae*); see also *All Things Considered: Vatican Cracks Down on Death Penalty*, Sept. 9, 1997, available at 1997 WL 12833464 (reporting on the “shift” in the Catholic Church’s position on death penalty that began with Pope John Paul II’s encyclical *Evangelium Vitae*).

⁴⁸ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20, ¶ 2266.

capital punishment, modern developments in imprisonment enable society to protect itself through non-lethal means and, therefore, the need to rely on the death penalty is diminished. The practical effect of such developments is to elevate a secondary aim, protection of society, above the primary justification of punishment, redressing the disorder, thereby overriding the retributive aim of punishment. Thus, the argument goes, retribution must no longer be the preeminent consideration in the Church's teaching on punishment. This argument would also seem to support the view, found in the USCCB statement, that social protection, not retribution, is punishment's primary purpose.⁴⁹

This view, however, does not reflect the traditional view of criminal punishment.⁵⁰ Although the Holy See has issued relatively few statements on the subject of criminal punishment, Pope Pius XII authored some of its most authoritative statements. Taken together, these statements reflect the traditional view of punishment, and are consistent with the *Catechism* and the teachings of Pope John Paul II. Making reference to the "theory of retribution," Pius XII wrote:

[I]t would be incorrect to reject completely, and as a matter of principle, the function of vindictive punishment. While man is on earth, such punishment both can and should help toward his eternal salvation. . . . The result of vindictive penalties is in no way opposed to the function of punishment, which is the re-establishment and restoration of the order of justice which has been disrupted, a function which We have already indicated as essential to all punishment.⁵¹

Further, he calls retribution "the most important function of punishment."

Part of the concept of the criminal act is the fact that the perpetrator of the act becomes deserving of punishment. . . . Punishment is the reaction demanded by law and justice

⁴⁹ See *Responsibility, Rehabilitation, and Restoration*, *supra* note 1.

⁵⁰ This interpretation stems not so much from doctrinal development as from an ambiguity within the CATECHISM OF THE CATHOLIC CHURCH. The Holy See needs to further clarify and explain to the Church the relation between the general aims of punishment and the specific application of those aims in the context of capital punishment. Such a discussion, however, is beyond the scope of this paper.

⁵¹ POPE PIUS XII, *International Penal Law*, in 1 MAJOR ADDRESSES OF POPE PIUS XII 244, 313 (Vincent A. Yzermans ed., St. Paul The N. Cent. Publ'g Co. 1961) (1939).

against crime; they are like blow and counter-blow. The order of justice that is disrupted by the crime demands to be re-established and restored to its original equilibrium.⁵²

Admittedly, punishment serves other secondary aims beyond retribution. The *Catechism* states that "[p]unishment then, in addition to [preserving] public order and [the safety of persons], has a medicinal purpose: as far as possible, it [should] contribute to the correction of the [offender]."⁵³ Moreover, John Paul II writes that in redressing the disorder caused by the offense, punishment "also fulfils the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated."⁵⁴ This teaching is confirmed in the writings of Aquinas and others.⁵⁵

C. Aquinas and Retribution

In his *Summa Theologica*, Aquinas explains that human beings, like other things in nature, exist within an order.⁵⁶ As noted previously, human will is subject to three different orders. When someone commits a crime, he disturbs each of these orders and punishment endeavors to restore them.

In the first place a man's nature is subject to the order of his own reason; secondly, it is subjected to the order of another man who governs him either in spiritual or in temporal matters thirdly, it is subject to the universal order of the Divine government. Now each of these orders is disturbed by sin, for the sinner acts against his reason, and against human and Divine law. Wherefore he incurs a threefold punishment;

⁵² *Id.* at 308–09 (emphasis added).

⁵³ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 17, ¶ 2266.

⁵⁴ *EVANGELIUM VITAE*, *supra* note 45, ¶ 56.

⁵⁵ See, e.g., Clement of Alexandria, *Stromata*, or *Miscellanies*, in II THE ANTI-NICENE FATHERS 299, 438 (Alexander Roberts, D.D. & James Donaldson, L.L.D. trans., WM. B. Eerdmans Publ'g Co. 1962) ("Therefore the good God [acting through the state] corrects for three causes: First, that he who is corrected may become better than his former self; then that those who are capable of being saved by examples may be driven back, being admonished; and thirdly, that he who is injured may not be readily despised, and be apt to receive injury.").

⁵⁶ See generally ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 87, art. 1, at 973 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

one, inflicted by himself, viz. remorse of conscience; another, inflicted by man; and a third, inflicted by God.⁵⁷

There is a hierarchy among these different orders. The universal order is greater than the temporal or civil order governed by humans, which is greater than the order of any particular individual. Just as there is a hierarchy of orders disturbed by a crime, there is a hierarchy among the ends of punishment. Accordingly, restoration of the universal order is a greater good than the restoration of an individual order because the common good is greater than any private good.⁵⁸

There is a four-fold end to punishment. These ends are not congruent with one another, but they have an order among themselves according to whether they are greater or lesser goods. The primary end of punishment is to redress the disorder the offense introduced in the moral order as a whole. The secondary end of punishment is the restoration of the public and civil order. The tertiary end of punishment, which is closely related to the second, is the defense of public safety. Finally, punishment offers the rehabilitation of the offender himself, which is the restoration of the order within the criminal's soul.

Discerning the disorder in the moral order that punishment seeks to redress requires reexamination of the nature of the crime. As noted above, crime is an inordinate act;⁵⁹ precisely, it is a disordered act of the will where the offender has indulged his will beyond what is tolerable under the law. Thus, a moral disorder is introduced when someone voluntarily does evil. In restoring the moral order, it is evident that God is the principal administrator of punishment, for only God has care over the universal order of all things. In the case of punishment, civil authorities do not necessarily intend to restore the moral order in administering punishment. The primary end of something, however, is not always the principal intention of the one who uses it.⁶⁰ Thus, although retribution, or restoration of the moral

⁵⁷ *Id.*

⁵⁸ See 3 ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, pt. II, ch. 69, at 230 (Vernon J. Bourke trans., University of Notre Dame Press 1975) (1956) ("The common good is always [considered] more [godlike] than the good of one [only].") (internal quotations omitted).

⁵⁹ See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. I-II, Q. 87, art.1 at 973 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

⁶⁰ For example, although marital intercourse has as its primary aim the procreation of children, it is not primary in the intention of those couples practicing

order, is the primary aim of punishment, it may not be primary in the order of intention for the civil authority that administers punishment.

For Aquinas, the human will is subject not only to the universal order, but also to the temporal order of society. Accordingly, the secondary aim of punishment is the defense and restoration of the public or civil order that is disturbed by the offense. As noted above, a civil authority does not look to punishment's primary aim when administering it, but considers instead its other aims. This is true for several reasons. First, punishment for transgressions against the law can never adequately match the moral quality of the acts committed, since only God "searches all hearts and understands all the mind's thoughts,"⁶¹ and only God can deliver punishments that are truly just. Therefore, the perfect restoration of the moral order is properly within the powers of God. Second, civil authorities have care over a more restricted common good, namely, the civil or public good. Civil authorities assign punishments according to whether a particular crime is more or less detrimental to the civil good, and not necessarily according to its moral gravity.⁶² For example, although fornication is a greater violation of the moral order, the state punishes theft more severely because theft is more obviously a detriment to the civil common good.

Nevertheless, civil authorities should strive to participate as much as possible in the Divine justice and the restoration of the moral order. In fact, the primary aim of punishment often coincides with the principal intention of the temporal authority that punishes, as in the case of murder, a grave moral disorder that is punished in a proportionate manner by the state. Consequently, retribution remains the state's goal when employing punishment. Pope Pius XII confirms this point:

Every moral transgression, even if materially committed within the jurisdiction proper to legitimate human laws and punished by men in accordance with positive human codes, is always in addition a sin before God, and incurs His punitive

periodic continence. This is legitimate for a time, so long as the marital act retains its primary aim. See, e.g., PAUL IV, ENCYCLICAL LETTER *HUMANAE VITAE* ¶ 11 (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/document_s/hf_p-vi_enc_25071968_humanae-vitae_en.html.

⁶¹ 1 *Chronicles* 28:9 (New American).

⁶² ST. THOMAS AQUINAS, *ON EVIL*, Q.2, art.10, at 89 (Jean Oesterle trans., Univ. of Notre Dame Press 1995).

judgment. . . . Sacred Scripture teaches that human authority, within its proper limits, is the minister of divine justice in the inflicting of punishment. . . . [The criminal] is accepting his suffering from God, and offering it to Him as a partial payment of the debt he has contracted before God.⁶³

Thus, when human authorities inflict punishment, it is not merely to restore the civil order and rehabilitate the criminal; rather, the ultimate aim is punishment's participation in God's justice, whereby the moral order is partially restored.

Viewed as such, we can better understand the USCCB's citation to Aquinas in *Responsibility, Rehabilitation, and Restoration* as supporting the argument that punishment in the present life must not be sought for its own sake.⁶⁴ Punishing someone for the sake of punishment alone is not sought in this life, not because it is evil *per se*, but because we are not in the "final time of retribution."⁶⁵ In other words, God can only accomplish the primary aim of punishment—retribution, or the complete restoration of the moral order—at the end of time. In this life, as we await the "final time of retribution," punishment should not be purely retributive, but also should be the "character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth."⁶⁶

At the "final time of retribution," however, there will be no need for medicine because there will no longer be any opportunity for the sinner's reform, and all considerations for the civil common good will have passed away. Punishment will only then be sought for its own sake—the restoration of the universal moral order.

Until then, civil authorities look to the secondary aims of punishment, reform of the criminal and the civic good, without dispensing with retributive justice. As Aquinas argues:

When, therefore, anyone does good or evil to another individual, there is a twofold measure of merit or demerit in his action: first, in respect of the retribution owed to him by the individual to whom he has done good or harm; secondly, in respect of the retribution owed to him by the whole of society. Now when a man ordains his action directly for the good or evil of the whole

⁶³ POPE PIUS XII, *International Penal Law*, *supra* note 51, at 316.

⁶⁴ See *Responsibility, Rehabilitation, and Restoration*, *supra* note 1.

⁶⁵ See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 68, art.1, at 486 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

⁶⁶ See *id.*

society, retribution is owed to him, before and above all, by the whole society.⁶⁷

The tertiary end of punishment is the defense of public safety, which the offender's imprisonment primarily fulfills. Punishment also cultivates public safety by generally deterring those who wish to avoid the criminal's fate, while specifically deterring the criminal from repeating his offense.

Finally, the common good of the whole is not exclusive from the individual goods of those constituting the whole. Accordingly, punishment must always strive for the criminal's rehabilitation by restoring the order within his own soul. When a criminal commits a voluntary evil, restoration of the order within his soul is achieved by inflicting upon him a proportionate evil contrary to his will. In this manner, the offender becomes aware of his crime by suffering an evil of the same magnitude. If the criminal has contrition, and accepts his punishment as just, then the punishment "[takes on] the value of expiation."⁶⁸ However, restoration of the disorder within the criminal is primarily a function of his own conscience and God's grace. Just as civil authorities infliction of criminal punishment cannot itself restore the moral order, a function that primarily belongs to God, it cannot restore the order within the criminal who must acknowledge his wrongdoing on his own accord.

IV. THE JUSTIFICATION OF PUNISHMENT

The primary purpose of punishment is different from its justification. In the modern debate on punishment theory, commentators often say that utilitarian theorists, those who promote rehabilitation, deterrence, etc., essentially view punishment as an evil, which can only be justified if the evil resulting from it is outweighed by the evil that would have resulted had the punishment not been inflicted.⁶⁹ Conversely, retributivists view punishment as intrinsically good, such that it

⁶⁷ See *id.* at pt. I-II, Q. 21, art.4, at 687. Obviously, Aquinas is no authority for the denial of the retributive justification of punishment.

⁶⁸ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20, ¶ 2266.

⁶⁹ See Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1557 (2002); see also Russell P. Hanser, *Punishing Hate, Punishing Harm*, 90 J. CRIM. L. & CRIMINOLOGY 1047, 1067 (2000).

does not need to be justified.⁷⁰ Consequently, retribution becomes not only the primary aim of punishment, but also its justification.

The utilitarians' notion of justice is different from that of a retributivist. Indeed, the difference is not merely a divergence in the application of a principle. Rather, the two views are fundamentally at odds with one another on how they determine the justness of human action.

The differences between utilitarians and retributivists are ultimately reduced to a fundamental difference in moral philosophy. For the pure utilitarian, an action's justness is determined solely from its consequences. An action is morally right if it produces desirable results. For a utilitarian, justice is merely a particular facet of utility. Punishment is just if it produces desirable consequences without regard to whether it is deserved. From a utilitarian perspective, "no one can deserve punishment; it can merely be right that he should be punished."⁷¹ For the retributivist, an action can be intrinsically good or bad without consideration of its consequences.

The conflicting views regarding the nature and justification of punishment are merely the applications of these respective philosophies. Thus, the utilitarian will justify punishment by pointing to its effects, its deterrent effect on others, its tendency to reform the criminal, and its reduction of crime. The retributivist will justify punishment merely by arguing that the criminal deserves it. To punish according to desert is an act of justice, and justice is a good. Thus, punishment is good irrespective of its results. To the extent that justice for a utilitarian does not concern what is properly due to another, it is not justice at all, but merely a form of the useful.

The utilitarian philosophy, in principle, is opposed to Catholic moral philosophy. The Church, in fact, teaches that certain actions are intrinsically evil and can never be justified by desirable consequences. This is precisely why the USCCB statement is troublesome. Although rehabilitation and social protection are certainly desirable consequences of punishment, they do not justify punishment. In the modern debate, however,

⁷⁰ See Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 879 (2002); see also Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 975 (2000).

⁷¹ JOHN PLAMENATZ, *THE ENGLISH UTILITIANS* 80 (reprint 1966).

one cannot be entirely content with merely rejecting utilitarianism and aligning with the retributivist ranks. Missing from the modern debate of punishment is a complete Thomistic account of the nature and purposes of punishment. In this regard, the USCCB missed an opportunity to advance the debate.

Aquinas makes a critical distinction between punishment administered in this life and punishment administered in the after-life. Punishment in this life, he says, has more of a medicinal character. Aquinas says: "The punishments of this life are medicinal rather than retributive. For retribution is reserved to the Divine judgment. . . ."⁷²

Traditionally, the medicinal aspect of punishment refers to its effects upon society, and to a lesser extent, the criminal.⁷³ Punishment in this life is not purely medicinal, but also manifests a retributive quality.⁷⁴ Punishment in the after-life, however, is purely retributive, because all considerations of social impact are absent, and the potential for the criminal's reform and rehabilitation no longer exists. All that remains is to redress the disorder caused by the criminal's offense – the restoration of the disturbed order as its final end.

Thus, to consider punishment in the after-life is to consider punishment *qua* punishment. That is, only when God at the Final Judgment administers punishment is it administered according to its principal end: retribution for the violation of the universal order. This is punishment for its own sake. In this life, punishment is not pursued for its own sake, but is seen more as a tool. Thus, punishment is not administered merely to

⁷² See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. II-II, Q. 66, art. 7, at 1480 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

⁷³ *Id.* at Q. 68, art. 1, at 1486 ("Now the punishments of this life are sought, not for their own sake, because this is not the final time of retribution, but in their character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth. . . .").

⁷⁴ Aquinas says punishment is "[more] medical . . . than retributive." ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. II-II, Q. 66, art. 7, at 1480 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947) (emphasis added). Some translations render this as "[p]enalties imposed in this life are corrective rather than retributive," a critical difference for our purposes. The Latin, however, unmistakably shows this to be inaccurate—"poenae praesentis vitae *magis* sunt medicinales quam retributivae:" penalties imposed in this life are *more* corrective rather than retributive. ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. II-II, Q. 66, art. 7, at 1480 (Marcus Lefebure, O.P. trans., Blackfriars 1975) (emphasis added).

redress a disorder, but also for certain medicinal purposes. In so doing, however, we are not really speaking about punishment at all, because the medicinal effects are goods brought about by *means of* punishment. If punishment were only administered in this life for its medicinal effects, then the same effects could be achieved through punishing the innocent, assuming the public perceived the innocent to be guilty.⁷⁵ But this ceases to be punishment, except in some equivocal sense, because punishment presupposes guilt. Thus, all punishments, even in this life, must be retributive, not simply medicinal, for by its very nature punishment ceases to exist if it is not given according to what the criminal deserves.

Among the competing modern theories on the justification of punishment, only retribution considers what is just, or what the criminal's actions deserve. Regarding the other "justifications" often given for punishment, C.S. Lewis wrote:

There is no sense in talking about a 'just deterrent' or a 'just cure.' We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether.⁷⁶

CONCLUSION

In summary, Aquinas teaches that crime is an evil infraction against a prescribed order in which the criminal indulges his own will beyond what is allowable under a given law. Punishment is a proportionate evil imposed against the will of the criminal, administered by one responsible for a particular order, in an attempt to restore the disturbance caused by the crime. But because every person is subject to several different orders, each of which is disturbed by crime, the aim of criminal punishment will vary insofar as it endeavors to restore each of these orders. The primary aim of punishment is retribution, or the restoration of the universal order, because the common good

⁷⁵ See generally I THE WORKS OF JEREMY BENTHAM 478-483 (John Bowring ed., Russel & Russel, Inc. 1962) (discussing the punishment of the innocent).

⁷⁶ C.S. LEWIS, *The Humanitarian Theory of Punishment*, in GOD IN THE DOCK 287, 288 (Walter Hooper ed., William B. Eerdmans Publ'g. Co., reprint 1972) (1970).

to which the universe is ordered is greater than the good of any other order. The secondary aim of punishment is the restoration of the civil or public order. The tertiary aim of punishment, which is closely related to the second, is the defense of public safety. Finally, punishment aims at the rehabilitation of the criminal, or the restoration of the order within the criminal's soul.

The Catholic Church has consistently taught that retribution is the primary aim of punishment. This is clear from previous statements of the USCCB, the *Catechism*, and the teachings of Aquinas and Popes Pius XII and John Paul II. There is critical distinction, however, between the primary aim intrinsic to the nature of punishment—retribution for the violated moral order—and the primary aim of punishment intended by temporal authorities—retribution for the violated public or civil order.

Responsibility, Rehabilitation, and Restoration, however, misrepresents this view of criminal justice by focusing instead on rehabilitation and societal protection. Criminal rehabilitation and social protection are indeed legitimate goals, but they are not the primary aims, nor are they justifications for the infliction of punishment. Consequently, the USCCB statement does not provide a full representation of the Catholic perspective on punishment. Although it raises many accurate observations and valid concerns, it fails to acknowledge the consistent Catholic teaching that the primary and justifying purpose of punishment is retribution. Such failure limits the potential impact of the USCCB statement, and risks advancement of unsound policies related to crime and punishment.

Despite its theoretical flaws, *Responsibility, Rehabilitation, and Restoration* affirms certain perennial truths about punishment, such as the existence of free will as the basis of responsibility, the importance of providing opportunities for the criminal's reform, the need for social protection and crime prevention, and the necessity of a stable family life as an element in reducing crime. Thus, it would be unfair to dismiss this document as a whole.

Ultimately, however, *Responsibility, Rehabilitation, and Restoration* may be indicative of a profound misunderstanding regarding man, crime, and society. In a way, this statement represents a form of extreme autonomy, in which the individual

“good” is substituted for the primacy of the common good. The hierarchy of ends that punishment achieves is turned on its head, and rehabilitation of the criminal becomes the greatest good, while restoration of the common good and the universal order to which the criminal belongs is virtually dismissed. Although criminal rehabilitation and social protection are legitimate goals, the USCCB failed the Church by not affirming the consistent Catholic teaching that the primary and justifying purpose of punishment is retribution.